No. 10,982

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

T. A. SMALL,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

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To the Honorable United States Circuit Court of Appeals for the Ninth Circuit:

The appellant T. A. Small respectfully petitions for a rehearing in the above entitled cause upon the following grounds:

1. The court inadvertently misconceived the contentions made by the appellant.

2. The court erred in holding that the evidence supported a conviction of sale in violation of the Emergency Price Control Act of 1942.

1. THE COURT INADVERTENTLY MISCONCEIVED THE CONTENTIONS MADE BY THE APPELLANT.

The opinion states:

> "The only question meriting our consideration was appellant's contention that he was found guilty of and sentenced to imprisonment for a crime not charged in the information."

Nowhere in his brief did appellant make a contention of such character. His contention was exactly the opposite. He contended that although the information charging sale would authorize a conviction of attempted sale, evidence merely establishing attempted sale would not authorize a conviction of sale. He relied upon the instructions of the court telling the jury that "the facts adduced at the trial do not support the charge in the information that defendant made an actual sale"; that "the evidence does not support a charge that there was a sale"; and that the jury might therefore find "that the defendant here was guilty of an attempt to sell". (Bf. App. 5-6.) He challenged the action of the trial court in refusing to direct a verdict in his favor on the charge of sale, and leaving the case in such shape that the jury nevertheless found him guilty of sale. (Bf. App. 8-12.) He invoked the Supreme Court case of *St. Clair v. United States,* 154 U.S. 134, 14 S.Ct. 1002, 1010, 38 L.Ed. 936, as decisive authority to the effect that his conviction and sentence were on the charge of sale and not attempted sale. (Bf. App. 10-11.) And he contended that the judgment should be reversed because the evidence and the law did not support a conviction and

sentence for sale, but at most supported a conviction and sentence for the lesser offense of attempted sale. (Bf. App. 8-12.)

It is therefore obvious that the court inadvertently misconceived the contentions of the appellant, and that a rehearing should accordingly be granted.

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2. THE COURT ERRED IN HOLDING THAT THE EVIDENCE SUPPORTED A CONVICTION OF SALE IN VIOLATION OF THE EMERGENCY PRICE CONTROL ACT OF 1942.

The opinion states:

> "The appellant did acts here toward the commission of the crime charged in the information. The appellant more than attempted to make a sale, he actually completed all the acts to consummate the sale. The testimony, which is uncontradicted, shows that he accepted the down payment and in effect issued a delivery order in that he directed the purchaser to go to the Rollandelli Warehouse and present the balance of the purchase price and pick up the whiskey. No other act of the appellant was required to complete the sale. The sale was made but the goods were not delivered because the law intervened to prevent it. The lower court was more correct in describing the sale as an abortive sale. We believe the evidence would support a conviction on the information as charged."

Appellant respectfully points out, moreover, that the settled law of sales is opposed to the conclusion of

this court that the evidence supported a finding that a sale was made.

In *Hawaiian Gas Products Co. v. Commissioner Int. Rev.,* 126 F. 2d 4, this court said at page 5:

> "'A sale', said the Supreme Court in the Five Per Cent Cases (State of Iowa v. McFarland), 110 U. S. 471, 478, 4 S. Ct. 210, 214, 28 L. Ed. 198, 'in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent'."

To the same effect are the decisions of this court in *Rogers v. Commissioner Int. Rev.,* 103 F. 2d 790, 792, and *Perata v. Commissioner Int. Rev.,* 89 F. 2d 550, 552. In the case last cited (89 F. 2d 550), it was said, at page 552:

> "The distinction between a contract of sale and a sale is shown in 55 C. J. 39, sec. 5: 'A contract to sell goods, as distinguished from a sale, is a contract whereby the seller agrees to transfer the property in goods to the buyer for a price which the buyer pays or agrees to pay, as where there is no price paid for the goods and no delivery of them. * * * A contract to sell is merely a promise of an executory nature, and until it is executed gives merely a right of action for its breach, or specific performance, and does not pass the property in goods or chattels, whereas a sale is in the nature of a conveyance or transfer of title'."

The applicable law on the subject is summed up in *Fox v. United States,* 4 Cir., 34 F. 2d 99, where a con-

viction for sale in violation of the National Prohibition Act was reversed. At pages 99 and 100 the court said:

> (99) "In the second place, there was no delivery of liquor by the defendant or by any one acting in his behalf. The statute (27 USCA, sec. 12) provides that, 'no person shall manufacture, *sell,* barter, transport, import, export, (100) deliver, furnish or possess any intoxicating liquor,' etc., and the violation of the statute with which defendant is charged is selling. An executory contract to sell might, in a proper case, constitute a conspiracy to violate the act * * *; but there could not be a sale in violation thereof unless the sale were completed by delivery, either actual or constructive, which is not present in this case. 'The offense of illegally selling liquor is not committed by a bargain or executory contract for a sale. There must be a completed sale, which passes the property, consummated by the act of the parties as distinguished from the operation of law, and amounting to a vending and purchasing of the particular commodity.' (33 C. J. 591; Filatreau v. United States, 14 F. 2d 659; * * *.)

It is elementary that a sale involves a transfer of title, and that there can be no sale until a specific chattel has been ascertained and identified. Here there was no transfer of title to any intoxicating liquor and no liquor was ascertained or identified as the subject of sale. The most that can be said, even if the transaction between defendant and Allen be construed as a bona fide agreement on the part of defendant to deliver

liquor to Allen, is that there was a mere executory contract to sell. This is not a sale. The distinction is pointed out in Mechem on Sales, par. 5, quoting Chalmers on Sales, as follows:

' "By an agreement to sell," it has been said' a jus in personam is created; by a sale a jus in rem is transferred. If an agreement to sell be broken, the buyer has only a personal remedy against the seller. The goods are still the property of the seller, and he can dispose of them as he likes. * * * But if there has been a sale, and the seller breaks his engagement to deliver the goods, the buyer has not only a personal remedy against him, but also the usual proprietary remedies against the goods themselves, such as an action for conversion and detinue." '

The distinction is well stated by Prof. Williston in the second edition of Williston on Sales, par. 2, as follows:

'Whether a bargain between parties is a contract to sell or an actual sale depends upon whether the property in the goods is transferred. If it is transferred, there is a sale, an executed sale, even though the price be not paid. Conversely, though the price be paid, there is but a contract to sell (not very happily called an executory sale), if the property in the goods has not passed. * * *'

In Filiatreau v. United States, 14 F. 2d 659, the Circuit Court of Appeals of the Sixth Circuit held that there was no sale within the prohibition of the statute where there was no delivery even though the contract had been agreed and the whiskey had been sent for and was ready to be delivered."

An application of the foregoing principles in the law of sales to the evidence in the present case, will readily convince this court, just as the trial court was convinced, that at best the evidence merely established a contract to sell. As disclosed by the evidence for the government (Bf. App. 2-5) there was no "transfer of property", for defendant had no whiskey to transfer and no whiskey was delivered either actually or constructively. He had no title to any whiskey in the Rollandelli Warehouse. He had no control over any whiskey in the Rollandelli Warehouse. No specific whiskey was ever ascertained or identified as the subject of sale. This court therefore erred in holding that the evidence supported a conviction of sale.

Wherefore, it is respectfully submitted that a rehearing should be granted in the above entitled cause.

Dated, San Francisco, California,
February 20, 1946.

Fred McDonald,
Attorney for Appellant and Petitioner.

Certificate of Counsel.

The undersigned, counsel for appellant in the above entitled cause, hereby certifies that in his judgment the foregoing Petition for Rehearing is well founded, in both law and fact, and that it is not interposed for delay.

Dated, San Francisco, California,
February 20, 1946.

Fred McDonald,
Attorney for Appellant and Petitioner.